

7d/INS.FLSA/129563.1

VIA FAX

July 18, 2003

Mr. Sam Vitaro

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Re: INS.FLSA

Dear Arbitrator Vitaro:

It was a pleasure to meet with you in San Francisco on July 11, 2003.

A brief history of the July 11th meeting would be in order. The meeting in San Francisco was discussed in a conference call with the parties in April, 2003. In the April conference call you requested that the Union and the Agency meet and agree to a mutually agreeable date to meet in San Francisco. After a meeting with the Agency, the Union informed you that the Agency refused to agree to a date for a meeting of the parties and the arbitrator. In a letter dated June 12, 2003 (copy attached), you set forth several proposed dates for a meeting. After the Agency utterly refused to cooperate in setting a mutually agreeable date to a meeting, you informed the parties in a letter dated June 20, 2003, that the meeting would be held in San Francisco on July 11, 2003 (copy attached). The Union faxed letters to the Agency dated June 24, 2003 (copy attached), and July 9, 2003 (copy attached), urging the Agency's attendance at the July 11, 2003 meeting with the arbitrator. In its July 9, 2003 letter, the Union noted that the Agency refused to cooperate in an expedited delivery method (to the Agency) of the Union's July 11, 2003 meeting handbook and noted that the handbook was being delivered via the USPS. As you are well aware, the Agency explicitly refused to attend the July 11th meeting as per fax dated July 9, 2003.¹

¹ signed by Ilir M. Tsungu, Acting Chief, Labor and Employee Relations Policy Section, Headquarters Human Resources Management, of the U.S. Department of Homeland Security, Bureau Immigration and Customs Enforcement)(copy attached).

The Union hereby requests the arbitrator to issue the following orders² at his earliest possible convenience:

Immediate Payment of “Old Claimants”

- A. Within 20 days of this order, the Agency will immediately order/contract with the **processing centers** to calculate and pay the claims of all **old claimants** (with the exception of **newly excluded old claimants**) regardless of whether any suffer or permit claim has been made by any individual **old claimant**.
1. The Agency will immediately order/contract with the **processing centers** to issue separate checks/direct deposits for overtime pay for this case. Payments for overtime pay for this case will not be included in regularly scheduled payments to employees.
 2. The Agency will immediately order/contract with the **processing centers** to include with any checks/direct deposits for overtime pay for this case, a clear language explanation of how calculations were made by the **processing centers** and what information was used by the **processing center** for the calculation for that specific claimant. The calculation notice issued in this section will include specific contact information (including email address) of whom the claimant may contact should the claimant believe that the information used in the calculation or the calculation of backpay by the **processing center** was incorrect. The explanation will be presented to the Union, which will have 10 days to review and comment on its contents. Any disagreement as to the contents of the notice will be referred to the arbitrator for an expedited decision on notice content.

² The Union will use the following terms with the following meanings:

- a. “**claims period**” that period for which overtime may be due to individual claimants -June 2, 1991 through June 30, 1998.
- b. “**old claimants**”- the @8674 claimants, the names of whom were supplied by the Agency to the Union in digital form in the fall of 2001. The Agency concedes that these “old claimants” were members of the AFGE bargaining unit during some time of the “claims period”.
- c. “**newly excluded old claimants**” the @1011 “old claimants” that the Agency (in April 2003) now claims were negligently included in the Agency’s original “old claimant” list provided by the Agency to the Union and used by the Union in its web based claimant ID system which the Union ran in late 2001. The issue of **newly excluded old claimants** arose solely because of erroneous information that was provided to the Union by the Agency in 2001. See, ltr. From Fred Tingley dated May 30,2003, explaining Agency error. (copy attached).
- d. “**new claimants**” those @2706 unique claimants submitted by the Union that were gathered on the Union’s web based claimant ID system which the Union ran in late 2001.
- e. “**processing centers**” the entities (such as the National Finance Center) which will actually do the backpay calculations and arrange for payment of claims in the present case.

3. The Agency will immediately order/contract with the **processing centers** to include with each separate check/direct deposit notification for overtime pay for this case to each claimant, a copy of a document prepared by the Union (to be approved by the arbitrator) with a further explanation of the payment.
4. Computation for payment to any **old claimant** by a **processing center** will not be delayed by an assertion that either the **processing center** or the Agency lacks a current address for a current or former employee. The Agency will immediately use all available means (including but not limited to DHS, OPM, IRS, and SSA records/assistance) to discover current addresses of **old claimants** or their survivors.

Deciding Issues Involving “Newly Excluded Old Claimants”

- B. Within 10 days of this order the Agency will, at its option, do one of the following:
1. The Union will prepare a letter that will explain to all **newly excluded old claimants**, their current status in the present case and invite them to resubmit their names (with contact information) utilizing a website to be opened by the Union. The Agency will, within 10 days, address and mail (via first class mail), to all **newly excluded old claimants** (at Agency cost) the Union letter approved by the arbitrator. The creation and maintenance of the website will be a cost chargeable by the Union in this case, or;
 2. Within 10 days of this order, the Agency shall provide the Union with a list (in either a standardized digital format or mailing labels) of names and current addresses (including email addresses, if known) of all **newly excluded old claimants**. The Union will utilize the information provided by the Agency to prepare a letter that will explain to all **newly excluded old claimants** their current status in the present case and invite them to resubmit their names (with contact information) utilizing a website to be opened by the Union. The Union will provide any reasonable documentation the Agency may require so as to insure the confidentiality of the provided information and the Union will guarantee that the information gathered will not be used for any purpose outside the bounds of the present case), or;
 3. Within 10 days of this order, the Agency shall provide a third party contractor with a list (in either a standardized digital format or mailing labels) of names and current addresses of all **newly excluded old claimants**. The contractor shall, as a cost chargeable by the Union in this case, use the address information provided by the Agency to affix mailing labels to envelopes, stuff the envelopes with a letter to be supplied by the Union (to be approved by the arbitrator), and mailed (first class) to all **newly excluded old claimants**. The letter will explain to all **newly excluded old claimants**, their current status in the present case and invite them to resubmit their names (with contact information) utilizing a website to be opened by the Union.

- C. Within 10 days of this order, the Union will open a website to allow **newly excluded old claimants** to register as new claimants. The cost of creation and maintenance of this website will be a cost chargeable to the Agency in this case. The new claimant category (which has been closed since February, 2002) will be reopened solely to those **newly excluded old claimants** who choose to apply.

Deciding Issues Involving “New Claimants”

- D. To decide the issue of eligibility of all **new claimants** the following procedure will be ordered by the arbitrator:
1. Within 15 days of this order, the Agency will provide a comprehensive and final list (in digital form) to the Union of all reasons that any **new claimant** would not be eligible for overtime pay for any period of the **claims period**. All grounds for exclusion supplied by the Agency for each **new claimant** will be specific as to time and place for each individual **new claimant**. Any claim or defense for backpay for any **new claimant** not provided to the Union as specified above, will be waived by the Agency.
 2. Within 45 days of being provided with the Agency’s comprehensive and final list of all grounds for exclusion supplied by the Agency for each **new claimant** the Union will provide its final response to the Agency’s reasons for the exclusion of any **new claimant**.
 3. The arbitrator will make a final determination as to the eligibility of any **new claimant** for overtime pay (with the exception of suffer or permit overtime) in this case and the periods (if any) of eligibility. The arbitrator will order a hearing and the calling of witnesses if he believes it necessary. Pursuant to Art. 48(k)2 of the contract between the parties, the Agency will be responsible for the presence and the payment of travel and *per diem* for any witness who is an employee of the Agency that the arbitrator finds it necessary to call. Should the Agency refuse to cooperate in the presence of any employee witness all Agency defenses as to any **new claimant** that the witness might testify to will be stricken and all adverse presumptions from the absence of the witness will apply. Any hearing called by the arbitrator will take place in San Francisco.

Deciding Issues Involving Suffer or Permit Claims

- E. The Union has supplied claims information as to all suffer or permit claims to the Agency. The arbitrator finds that the Union has satisfied its burden of proof under Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-688 (1946); United States Department of Labor v. Cole Enterprises, Inc., 62 F.3d 775,779 (6th Cir. 1995). Pursuant to Mt. Clemens it is now the duty of the Agency to meet the Union's proof through the submission of sworn or otherwise authenticated evidence specific to each suffer or permit claimant. The Agency will submit a detailed response to each suffer or permit claim within 30 days from the date of this order.
1. The arbitrator will make a final determination as to all suffer or permit claims. The arbitrator will order a hearing and the calling of witnesses if he believes it necessary in any particular suffer or permit claim. Pursuant to Art. 48(k)2 of the contract between the parties, the Agency will be responsible for the presence and the payment of travel and *per diem* for any witness who is an employee of the Agency that the arbitrator finds it necessary to call. Should the Agency refuse to cooperate in the presence of any employee witness all Agency defenses as to any suffer or permit claim or claimant that the witness might testify to will be stricken and all adverse presumptions from the absence of the witness will apply. Any hearing called by the arbitrator will take place in San Francisco.

The Union hereby requests that the arbitrator issue the orders noted above at his earliest possible convenience. I believe that everyone involved in this case will agree that these matters are ripe for immediate adjudication.

Sincerely,

Joe Goldberg
Assistant General Counsel - Litigation

Enclosure

cc: Susan Dole
Randy Callahan